STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of WILLIAM KYLE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ROBIN H. KYLE and LISA KYLE,

Respondents-Appellants.

UNPUBLISHED
October 2, 2007

No. 271320
Wayne Circuit Court
Family Division
LC No. 06-454281

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

FITZGERALD, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority's conclusion that due process was not violated in the present case.[1]

In *Ryan v Ryan*, 260 Mich App 315, 333-334; 677 NW2d 899 (2004), this Court summarized the constitutional principles governing the state's intervention in parental decisions:

> Historically, Michigan has recognized the right of parents to manage their children without state interference, absent compelling circumstances that threaten a child's safety and welfare. Michigan laws and procedural rules, in keeping with the United States Constitution, "protect[] the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v East Cleveland, Ohio*, 431 US 494, 503; 97 S Ct 1932; 52 L Ed 2d 531 (1977). The Due Process Clause of the Fourteenth Amendment provides heightened protection against governmental interference with the fundamental liberty interest of parents to make decisions concerning the care, custody, and control of their children. This includes the right of parents to control their children's education. *Troxel v Granville*, 530 US 57, 68; 120 S Ct 2054; 147

[1] Because the guardian ad litem representing the child has not appealed the order requiring a medical examination, only respondents' constitutional rights are at issue in this appeal.

L Ed 2d 49 (2000); *Meyer v Nebraska*, 262 US 390, 401; 43 S Ct 625; 67 L Ed 1042 (1923).

> The fundamental liberty interest of parents with regard to their children permeates Michigan laws. MCL 722.1 *et seq.* codifies this fundamental right. Our courts have also emphasized this right. In *Herbstman v Shiftan*, 363 Mich 64, 67-68; 108 NW2d 869 (1961), our Supreme Court recognized the fundamental right of parents with regard to their children:
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> > "It is a well-established principle of law that the parents, whether rich or poor, have the natural right to the custody of their children. The rights of parents are entitled to great consideration, and the court should not deprive them of custody of their children without extremely good cause. A child also has rights, which include the right to proper and necessary support; education as required by law; medical, surgical, and other care necessary for his health, morals, or well-being. . . . It is only when these rights of the child are violated by the parents themselves that the child becomes subject to judicial control."
>
> The Court recently reaffirmed this parental right to the care and custody of their children absent proof of parental unfitness:
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> > "Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process. A due-process violation occurs when a state-required breakup of a natural family is founded solely on a "best interests" analysis that is not supported by the requisite proof of parental unfitness." [*In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003) (citations omitted).]

Although these comments arise from cases involving the most intrusive forms of state intervention in the parent-child relationship, they are also relevant to a court-ordered sexual abuse medical examination. Petitioner has not attempted to show that the medical examination is necessary to treat or diagnose William for any condition; rather, petitioner seeks the examination to determine whether there is evidence of sexual abuse.

The trial court's order invades the sanctity of the family and the authority of respondents to make medical and other decisions about William's care. These infringements on respondent's constitutional interests must be balanced against William's constitutionally protected right to necessary care and safety. Respondents' liberty interest may not be invaded by the state absent compelling circumstances that threaten a child's safety and welfare.

No showing of compelling circumstances appears to have been made here, where the trial judge conducted an informal discussion in chambers, did not allow a hearing on the record at which evidence would have been presented, and did not provide reasoning on the record to support his decision. Respondents have been attempting to challenge the veracity of the allegations contained in the petition since these proceedings commenced. If they are to be believed, they appeared at the June 13, 2006, proceedings ready to present evidence to support their assertion that the allegations contained in the petition constituted exaggerations, misrepresentations, and lies. The trial judge's adherence to the informal proceedings authorized

by MCR 3.962 in light of respondents' attempts to present evidence and challenge the petition and, thereby, the very authority of the court to act, impermissibly invaded respondents' liberty interest without a demonstration of compelling reasons to do so. I would hold that MCR 3.962, as applied on the facts of this case, is unconstitutional.

/s/ E. Thomas Fitzgerald